No. 25-178

In the Supreme Court of the United States

SARAH JONES, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, A.J.,

PETITIONER

v.

THE CITY OF LAURENTON, ET AL.,

RESPONDENT

ON WRIT OF CERTIORARI TO THE

UNITED STATES SUPREME COURT

BRIEF FOR RESPONDENT

Moot Member

Team 4

Attorneys for Respondent

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1. Under the Due Process Clause of the Fourteenth Amendment, is a state actor liable pursuant to the state-created danger doctrine for injuries inflicted by private parties when the state affirmatively creates or increases the danger to an individual?
2. Does the Takings Clause of the Fifth Amendment require just compensation for a taking when property is damaged as a result of an objectively necessary and valid exercise of a city's police powers?

STATEMENT OF THE CASE

On September 28, 2023, Sarah Jones called 911 to report that her former boyfriend, Mark Baker, was intoxicated and threatening her and her minor son, A.J. R. at 2. Laurenton Police Department Officers ("LPD") Trent and Williams (collectively, "the Officers") arrived at Ms. Jones's house to find Baker threatening Ms. Jones for calling 911. R. at 2. Ms. Jones informed the officers that Baker owned a handgun and had a background in military explosives. R. at 2. When asked if Ms. Jones and A.J. should leave the house for the night, Officer Trent explained that Baker should be detained until the morning because he had an outstanding arrest warrant for domestic assault in a nearby county. R. at 2. The officers took Baker into custody and called the county jail. R. at 2. Jail officials, in compliance with a standing City of Laurenton policy requiring officers to not execute certain warrants when the county jail was at capacity, informed the Officers that they could not detain Baker. R. at 2. Therefore, the officers took Baker's handgun and left him at a house he was renting. R. at 2. The Officers did not update Ms. Jones. R. at 2.

The following morning, Baker retrieved two homemade bombs from his rental home, packaged them, and took them to Ms. Jones's house. R. at 2. Baker placed one on the front porch and one on the back porch. R. at 2. When she got up, Ms. Jones saw what she thought was an

Amazon package on her front porch and brought the package inside. R. at 2. As she opened the package, the device detonated and caused severe injuries to her and her son. R. at 3. The explosion also caused minor damage to the front porch. R. at 3. A neighbor called 911, and first responders arrived to take Ms. Jones and A.J. to the hospital and investigate the scene. R. at 3.

The Officers discovered the second bomb on the back porch and immediately called the bomb squad. R. at 3. The bomb squad secured the area and deployed a robot equipped with an X-ray system and an energetic tool to get a closer look. R. at 3. The X-ray revealed the package contained an explosive device with remote detonation capabilities. R. at 3. Because Baker was not in custody, the bomb could not be removed without risking remote detonation. R. at 3. According to protocol, the bomb squad had to disrupt the bomb, or, if disruption was not possible, detonate it before the bomb could be moved. R. at 3. Following protocol and understanding that disruption was unlikely to be successful because of the device's sophistication, the bomb squad attempted disruption, then detonation. R. at 3.

The explosion leveled the rear half of the house and collapsed part of the roof. R. at 3. The house was determined to be unsafe and uninhabitable. R. at 3. An expert stated during a deposition that the house had to be demolished and rebuilt. R. at 3. The damage was estimated to be $385,000. R. at 3.

Ms. Jones sued the City of Laurenton and the Laurenton Police Officers (collectively "the City") under 42 U.S.C. § 1983. R. at 4. She alleged that the City was liable under the Due Process Clause because the Officers affirmatively created the danger that led to her injuries. R. at 4. She further alleged that the City was liable under the Takings Clause because the Officers destroyed her house without just compensation. R. at 4.

The district court entered summary judgment for the City on both claims, holding first that "there is no state-created danger theory under the Due Process Clause," and second that "the Takings Clause does not apply to destruction of property undertaken in the exercise of the police power." R. at 4. The Thirteenth Circuit affirmed, R. at 8, and Ms. Jones appealed. R. at 4.

SUMMARY OF ARGUMENT

This Court should affirm the district court's grant of summary judgment for the City and hold that the City did not affirmatively create or enhance a danger to Ms. Jones and A.J., and that the destruction of Ms. Jones's property was not a taking.

First, the state-created danger doctrine does not provide a constitutional claim when state actions incidentally lead to harm. The Fourteenth Amendment's Due Process Clause did not impose a duty on the City to protect individuals from private actors. Baker injured Ms. Jones and A.J., not the City. Further, circuit courts are divided over the doctrine's applicability, rendering the doctrine unworkable.

Even if this Court should find the state-created danger doctrine is a viable constitutional claim, the City's conduct did not affirmatively create or enhance the danger to Ms. Jones and A.J. The City's assurances of safety to Ms. Jones and the release of Baker did not create a danger itself. Ms. Jones and A.J. were not distinct victims because releasing Baker put the general populace at risk. Even though the City knew of Baker's bomb-making abilities, the City could not have foreseen Baker planting effective bombs at Ms. Jones's home because they did not know Baker possessed the necessary materials. The City's conduct was not egregious to the point of shocking the conscience because the Officers were not indifferent to Ms. Jones.

Second, the Takings Clause of the Fifth Amendment does not require the City to compensate Ms. Jones for the damage to her property. A taking requires just compensation when

private property is taken for public use pursuant to the government's eminent domain authority, because of a permanent physical occupation, or because of a regulation erasing all economic value of the property. Here, the City did not take Ms. Jones's property pursuant to its eminent domain authority, by a permanent physical occupation, or pursuant to a regulation erasing all economic value.

Even if this Court held that the City did take Ms. Jones's property, the City is not required to compensate Ms. Jones because the damage to Ms. Jones's property was incidental to a valid and objectively necessary exercise of the City's police power. When the government damages property to prevent or neutralize an imminent threat to persons or property, compensation is not required. Here, the City followed all proper protocols when determining that the only way to neutralize the bomb threat without endangering surrounding persons or property was to detonate it in place. The City determined it was objectively necessary to neutralize the bomb threat. The City's police powers enable it to protect public health and safety. Therefore, because the damage to Ms. Jones's property occurred incidentally to the City's objectively necessary and valid exercise of its police powers, compensation is not required.

ARGUMENT

Respondent respectfully requests this Court affirm the decision of the district court. Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A district court's grant of summary judgment is reviewed de novo. *Yawn v. Dorchester Cnty.,* 1 F.4th 191, 194 (4th Cir. 2021).

I. This Court should uphold summary judgment because the state-created danger doctrine is impermissible and the City did not affirmatively create or increase the danger to Ms. Jones and A.J.

This Court should affirm the Thirteenth Circuit's decision to uphold summary judgment for the City. First, the state-created danger doctrine is not rooted in the Fourteenth Amendment's Due Process Clause. The Due Process Clause provides "No person shall . . . [be] deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. § 1. State officials are liable when they violate an individual's due process rights. *See* 42 U.S.C. § 1983 ("Every person who, under color of any . . . State . . . *subjects, or causes to be subjected*, any citizen . . . other person . . . to the *deprivation of any rights, privileges, or immunities secured by the Constitution* . . . shall be liable . . . . ") (emphasis added). Second, the U.S. Courts of Appeals are divided over the doctrine's constitutional permissibility and applicability concerning claims.

The Due Process Clause does not impose an affirmative duty on the State to protect citizens from private actors. *DeShaney v. Winnebago Cnty. Dep't. of Soc. Servs.* 489 U.S. 189, 195–96 (1989). Following *DeShaney*, courts have declined to hold that "mere assurances by state officials" create a right to protection from private actors. *See Pinder v. Johnson*, 54 F.3d 1169, 1172, 1176 (4th Cir. 1995) (holding a victim did not have a right to protection from her violent former boyfriend when a police officer told her the boyfriend would be "locked up overnight," the officer subsequently released him, and the boyfriend set fire to the victim's home, killing her children). It is undisputed that the *Monell* standard dictating municipal liability has been met. R. at 4. *See also Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 694 (1978) (holding local governments are liable under § 1983 only when the "execution of a government's policy or custom . . . inflicts the injury"). Therefore, this Court should affirm the Thirteenth Circuit's decision to uphold the district court's grant of summary judgment because *DeShaney* rejected the state-created danger doctrine and circuit courts are divided over its application.

A. The state-created danger doctrine is not rooted in the Fourteenth Amendment's Due Process Clause.

The state-created danger doctrine is not rooted in the United States Constitution; rather, it is based on this Court's dicta in *DeShaney*. 489 U.S. at 201 (1989) ("[The State] played no part in [the danger's] creation, nor did it do anything to render [the victim] any more vulnerable to them."). A state assumes responsibility for an individual's safety when the state takes that individual into its custody. *Id.* at 197–200 (discussing the State's responsibility to incarcerated persons and involuntarily-committed mental patients).

In *DeShaney*, the Winnebago Department of Social Services (DSS) suspected a father was abusing his child, Joshua DeShaney, but the father denied the accusations, and DSS did not intervene. *Id.* at 192. A year later, even after Joshua was admitted to the hospital for injuries, a "Child Protection Team" found insufficient evidence of child abuse, dismissed a child protection case, and placed Joshua in his father's custody. *Id.* Following this incident, a DSS employee noted Joshua's injuries during home visits, but she did not take further action. *Id.* Eventually Joshua fell into a coma and suffered irreversible brain damage after his father severely beat him. *Id.* at 193. Joshua's mother brought a claim asserting that DSS's failure to intervene and protect Joshua deprived him of his liberty without due process. *Id.*

This Court held that the language of the Due Process Clause did not require "the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. This Court reasoned that the language imposes a "limitation on the State's power" rather than an affirmative grant of "safety and security." *Id.* In addition, this Court explained the Due Process Clause was meant "to protect the people from the State, *not* to ensure that the State protected them from each other." *Id.* at 196 (emphasis added). This Court specifically rejected the idea that the state can form a "special relationship" that imposes a duty of responsibility and care for an

individual. *Id.* at 197–98. However, this Court acknowledged there were "limited circumstances" when the Constitution "impos[ed] upon the State affirmative duties of care and protection." *Id.* at 198–99 (referring to medical care for incarcerated prisoners and involuntarily committed individuals).

Here, the Officers had no affirmative duty to afford safety and protection to Ms. Jones and A.J. because neither were under the City's care. Like in *DeShaney* where Joshua was not in the state's custody when he was injured, Ms. Jones and A.J. were not in the City's custody when the bomb detonated. *Id.* at 192; R. at 2–3. Therefore, the Officers did not have an affirmative duty to protect Ms. Jones and A.J. Additionally, the Due Process Clause did not obligate the Officers to protect Ms. Jones and A.J. from a private party. Like in *DeShaney* where Joshua's father beat him, here, Baker, a private actor, planted the bombs that caused the injuries to Ms. Jones and A.J. *DeShaney*, 489 U.S. at 192–93. An official is not responsible for an individual's safety when the official did not leave them in a worse position. *See DeShaney*, 489 U.S. at 201. In *DeShaney,* Joshua would still have been vulnerable in his father's custody if DSS had never intervened; likewise, Ms. Jones and A.J. were vulnerable to Baker's threats before the Officers intervened. Therefore, the Officers did not leave Ms. Jones and A.J. in a worse position when they released Baker.

This Court should affirm the Thirteenth Circuit's decision to uphold the district court's grant of summary judgment because the state-created danger doctrine is contrary to the Fourteenth Amendment's text and purpose and is based solely on dicta from *DeShaney*. Therefore, under *DeShaney*, the Officers were not responsible for protecting Ms. Jones and A.J.

B. Circuits Courts are divided over the doctrine's application.

Circuit courts are divided over whether *DeShaney* imposes liability on a state when the state affirmatively creates or increases danger to an individual. The Third Circuit found *DeShaney*

"had 'left open the possibility that a constitutional violation might … occur[]'" when the state creates or increases an individual's vulnerability to danger. *Johnson v. City of Philadelphia*, 975 F.3d 394, 399 (3d Cir. 2020) (quoting *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996)). Circuit courts rarely grant relief on the basis of the state-created danger doctrine. *See Johnson*, 975 F.3d at 492; *Turner v. Thomas*, 930 F.3d 640, 646 (4th Cir. 2019) (stating the Fourth Circuit has "never issued a published opinion recognizing a successful state-created danger claim" but "emphasiz[es] the doctrine's limited reach"). Nonetheless, even circuit courts with the state-created danger doctrine have questioned its constitutionality. The Sixth Circuit, which construes this Court's language in *DeShaney* broadly, concedes the doctrine is "an anomaly because neither the Fourteenth Amendment nor § 1983 regulates private actors." *Est. of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 491 (6th Cir. 2019) (internal citations omitted).

Not every circuit court has elected to adopt the state-created danger doctrine, but those that have adopted it do not use precisely the same tests to evaluate claims. *See Murguia v. Langdon*, 73 F.4th 1103, 1112–13 (9th Cir. 2023) (Bumatay, J., dissenting) (discussing each circuit's test for the state-created danger doctrine). The Eleventh Circuit employs a very narrow view of the state-created danger doctrine. The Eleventh Circuit concluded that this Court's standard in *Collins v. City of Harker Heights* "superseded" the state-created danger doctrine and that only government action that is "arbitrary or conscience shocking in a constitutional sense" constitutes a substantive due process violation. *Waddell v. Hendry Cnty. Sheriff's Off.*, 329 F.3d 1300, 1305 (11th Cir. 2003) (citing *Collins*, 503 U.S. 115, 128–29 (1992)).

The Fifth Circuit does not recognize the state-created danger doctrine. *Fisher v. Moore*, 73 F.4th 367, 368–70, 372 (5th Cir. 2023) (rejecting a claim brought by a mother against school officials after her daughter was sexually assaulted twice by a male student because school officials

knew of his violent history and previous assault against her daughter). *Id.* The Fifth Circuit has explained it was "reluctant to expand . . . substantive due process" for two primary reasons:

> (1) [T]he Supreme Court's recent forceful pronouncements signaling unease with implied rights not deeply rooted in our Nation's history and tradition; and (2) the absence of rigorous panel briefing that grapples painstakingly with how such a cause of action would work in terms of its practical contours and application, vital details on which our sister circuits disagree.

Id. at 369. However, the Fifth Circuit has not "entirely ruled out" the doctrine. *Id.* at 372 (stating the doctrine "is not clearly established . . . not categorically ruled out . . . we have merely declined to adopt this particular theory of constitutional liability").

Although a majority of circuit courts have adopted the state-created danger doctrine, this Court is not bound by the majority. *See id.* at 373 (internal citations omitted) (explaining other circuits' acceptance of the state-created danger doctrine is not enough to establish the theory of liability in the Fifth Circuit because the doctrine's application is not unanimous). The state-created danger doctrine is an anomaly, rooted in dicta from this Court's opinion in *DeShaney* and applied with splintering tests and rationales. Therefore, this Court should reject this doctrine.

C. If this Court finds *DeShaney* established a state-created danger doctrine, this Court should affirm summary judgment for the City because the doctrine is not applicable in this case.

Even if this Court finds the Fourteenth Amendment Due Process Clause permits the state-created danger doctrine, the City's actions did not rise to the level of a state-created danger. No two circuit courts evaluate a state-created danger claim in exactly the same manner; however, there are elemental themes this Court should consider.

First, this Court should evaluate whether the City's affirmative conduct created or increased the danger, or risk of harm, to the plaintiff. *See Irish v. Fowler*, 979 F.3d 65, 75 (1st Cir. 2020); *Okin v. Vill. of Cornwall-On-Hudson Police Dept*., 577 F.3d 415, 428 (2d Cir. 2009); *Johnson*, 975 F. 3d at 400; *Callahan v. N.C. Dep't. of Pub. Safety*, 18 F.4th 142, 146 (4th Cir. 2021); *Est. of*

Romain, 935 F.3d at 491–92; *Est. of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019); *Villanueva v. City of Scottsbluff*, 779 F.3d 507, 512 (8th Cir. 2015); *Murguia v. Langdon*, 61 F.4th 1096, 1111 (9th Cir. 2023) (citing *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971–72 (9th Cir. 2011)); *Est. of B.I.C. v.* Gillen, 761 F.3d 1099, 1105 (10th Cir. 2014); *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001).

Second, this Court should evaluate whether the danger was specific to the plaintiff rather than a risk to the public. *Irish*, 979 F.3d at 75; *Est. of Romain*, 935 F.3d at 491–92; *Villanueva*, 779 F.3d at 512; *Est. of B.I.C.*, 761 F.3d at 1105 (internal citation omitted). *See also Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 717 (3d. Cir. 2018).

Third, this Court should evaluate whether a state could foresee or know of the risk, danger, or injury to the victim. *See Johnson*, 975 F.3d at 400 (internal citation omitted); *Est. of Romain*, 935 F.3d at 491–92; *Villanueva*, 779 F.3d at 512 (stating the risk must be "obvious").

Finally, this Court should evaluate whether a state's conduct "shock[s] the conscience." *See Irish*, 979 F.3d at 75; *Okin*, 577 F.3d at 428; *Johnson*, 975 F.3d at 400; *Callahan*, 18 F.4th at 149 n.5; *Est. of Her*, 939 F.3d at 876; *Villanueva*, 779 F.3d at 512; *Est. of B.I.C*, 761 F.3d at 1105; *Butera*, 235 F.3d at 651.

1. The Officers' conduct did not affirmatively create or enhance the danger to Ms. Jones and A.J.

The Officers' decision to release Baker and not inform Ms. Jones did not affirmatively create or enhance a danger. When a state affirmatively creates or enhances a risk of danger or harm to an individual, the state could be liable for harm inflicted on the individual. *See Irish*, 979 F.3d at 75. Whether an official increased the danger a victim faced depends on "whether [the victim] was safer *before* the state action than he was *after* it." *Cartwright v. Cnty. of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003). *See also DeShaney*, 489 U.S. at 201 (emphasizing that the victim was

placed in "no worse position than . . . he would have been in" if the state did not act). An official's negligent act alone does not trigger liability under the Due Process Clause. *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

First, a state's inaction or negligence is insufficient under the state-created danger doctrine. *See Johnson*, 975 F.3d at 400–01 ("[A] classic allegation of omission . . . a claim of inaction and not action. That is not enough . . . ."). In *Johnson*, an individual claimed a fire department dispatcher violated due process by not informing firefighters of a family located in a burning building. *Id.* at 401. Like the dispatcher's failure to communicate the family's location, the Officers failed to communicate Baker's release to Ms. Jones. *Id.*; R. at 2. This alone is not an affirmative act that created or enhanced a risk to Ms. Jones and A.J., making it insufficient for a successful state-created danger doctrine claim.

Second, state assurances of safety alone are not affirmative acts that create or enhance dangers for victims. *Gray v. Univ. of Col. Hosp. Auth.*, 672 F.3d 909, 925 (10th Cir. 2012). In *Gray*, a patient receiving epilepsy treatment died while unattended in the hospital. *Id.* at 912. The hospital "represented" to the patient's family that the patient would receive 24-hour care and monitoring; the hospital provided an "information sheet" to the family regarding this care. *Id*. The family claimed that the hospital's assurances, combined with a policy allowing staff to leave the patient unattended, endangered the patient. *Id.* at 913. The court held that, although the hospital was "aware of the risk, expressly promised to eliminate the risk, and failed to do so," there was no due process violation. *Id.* at 925. The court reasoned that assurances of protection are not "affirmative conduct sufficient" to create liability. *Id.* Here, the Officers' assurance that Baker would be detained did not create liability for Baker injuring Ms. Jones and A.J. Like the hospital in *Gray*, an Officer made an assurance of safety to Ms. Jones when he said Baker would be put in jail. *Id.* at

912; R. at 2. Therefore, the release of Baker following an Officers' assurance he would be locked up, and the overcrowding policy did not affirmatively create or enhance a danger to Ms. Jones and A.J.

Third, an official's "explicit[] or implicit[] official sanction of private violence" can be affirmative conduct that violates due process. *Okin*, 577 F.3d at 429. In *Okin*, police officers regularly responded to a woman's domestic violence complaints over a fifteen-month period but failed to arrest the perpetrator and in fact implicitly encouraged the perpetrator's violence. *Id* at 429–32. During responses to the victim's complaints, officers would talk with the perpetrator about topics such as football rather than address the complaint. *Id* at 430. The officers even failed to arrest the perpetrator when he spoke about smacking the victim. *Id.* The court held there was an issue of material fact pertaining to whether the officers had encouraged the perpetrator's violence. *Id.* The court reasoned the officers' "implied message" encouraged the perpetrator and rendered the victim more vulnerable because the perpetrator knew of the officers' own indifference to the victim. *Id.*

Here, the Officers' release of Baker and not telling Ms. Jones was not an implicit endorsement of violence that constituted an affirmative act. Unlike the officers in *Okin* who refused to arrest the violent perpetrator, the Officers took Baker into custody after Ms. Jones's 911 call. *Id.* at 429; R. at 2. Although the Officers did not officially arrest Baker, this did not sanction violence because the Officers only released him to comply with a jail overcrowding policy. R. at 2. Moreover, the Officers explicitly condemned Baker's violence by taking his gun. *Id.*

2. The Officers did not place Ms. Jones and A.J. specifically at risk because the City's jail overcrowding policy affected the general public.

The Officers' release of Baker and decision not to inform Ms. Jones did not specifically endanger Ms. Jones and A.J. compared to the public. Under the state-created danger doctrine, an

officer's conduct must create a risk specific to the victim and not the general populace. *Irish*, 979 F.3d at 75; *Est. of Romain*, 935 F.3d at 491–92; *Villanueva*, 779 F.3d at 512; *Est. of B.I.C.*, 761 F.3d at 1105 (internal citation omitted). *See also Sauers*, 905 F.3d at 717 ("[A] relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general.").

In *Gray*, a hospital had a policy allowing hospital staff to leave patients unattended in the Epilepsy Monitoring Unit. 672 F.3d at 913. A deceased patient's family asserted the hospital's policy and assurances of the patient's safety amounted to a constitutional duty on the part of the hospital and a deprivation of the patient's due process rights. *Id.* at 914–15. The hospital's policy permitted staff to leave patients in the Epilepsy Monitoring Unit unattended. *Id.* at 913. The court held the family failed to provide reasoning "as to why [the hospital's] policies and customs . . . translate into constitutional liability." *Id.* at 914. The court reasoned that creating the policy did not create an immediate or direct threat to one particularized person but to the general populace. *Id.* at 926. (citations omitted). Therefore, the court reasoned that this policy affecting the general populace did not "establish the necessary causal link between the danger to the victim and the resulting harm." *Id.* at 926.

Here, the Officers' actions did not pose a risk to Ms. Jones and A.J. as a distinct group compared to the general populace. Like the hospital's policy in *Gray,* putting hospital patients at risk by permitting them to be unattended, the overcrowding policy puts citizens at risk because potentially dangerous individuals would not be arrested if the jail was at capacity. *Id.* at 913; R. at 2. However, the Officers' adherence to the policy presented a risk to the public, highlighting that Ms. Jones and A.J. were not foreseeable victims or a discrete class. Although the Officers were

aware Baker threatened Ms. Jones and A.J. prior to being detained, Baker's release still did not pose a threat specific to Ms. Jones and A.J. *Id.* Just as the hospital staff in *Gray* were likely aware of the dangers of leaving any patient unattended, the Officers knew Baker's release could pose a threat to someone. *Id.* However, the Officers did not know Baker's release posed a threat *specifically* to Ms. Jones and A.J. because Baker's outstanding warrant was for domestic assault in a completely different county. R. at 2. Therefore, the Officers' release of Baker pursuant to the overcrowding policy did not create a risk specific to Ms. Jones and A.J. and there is not a causal link between the danger and resulting harm.

3. The Officers did not know or have reason to know or foresee that Baker had effective bombs and would place them at Ms. Jones's house.

The City and the Officers did not know or foresee, and could not have known or foreseen, Baker's release would lead to bombs injuring Ms. Jones and A.J. Several circuit courts consider whether a risk itself was foreseeable, known, or obvious to the state. The Third Circuit requires the harm the victim faced to have been "foreseeable and fairly direct." *Sauers*, 905 F.3d at 717. Circuit courts also evaluate whether the risk or the harm itself was "obvious or known." *Villanueva*, 779 F.3d at 512; *Est. of B.I.C*, 761 F.3d at 1105. *See also Est. of Romain*, 935 F.3d. at 492 (quoting *Cartwright*, 336 F.3d at 493 (considering whether the state "knew or should have known" its conduct endangered the victim)).

The Officers did not know and could not have foreseen Baker's use of effective bombs to harm Ms. Jones and A.J. Although Ms. Jones told the Officers about Baker's ability to make bombs, the Officers did not know Baker possessed effective bombs. R. at 2. Knowing someone can make a bomb is not the same as knowing someone has the materials to make bombs. In addition, the Officers could not have foreseen any of Ms. Jones's and A.J.'s injuries because the

Officers confiscated Baker's gun. Therefore, the City did not and could not have foreseen the risk of harm to Ms. Jones and A.J. because it was not obvious to them that Baker had bomb materials.

4. The City and Officers' actions did not shock the conscience.

The City's conduct did not shock the conscience because its conduct was not egregious to the point of being arbitrary or deliberately indifferent towards Ms. Jones and A.J. An official violates due process through "egregious" actions that are "arbitrary" or "'conscience shocking, in a constitutional sense.'" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 834, 847 (1998), *abrogated on other grounds* (quoting *Collins*, 503 U.S. at 128). There must be a "degree of culpability" with which an official acts. *Sauers*, 905 F.3d at 717. *See also Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 932 (6th Cir. 2020) (stating the culpability element can be the sole element considered in the state-created danger doctrine). This finding that conduct was egregious to the point it shocked the conscience is necessary to impose liability upon an official. *Est. of Her*, 939 F.3d at 874 (stating a shock-the-conscience is a "necessary predicate for a court to find that an injury from a state-created danger amounts to a due-process violation").

First, an official's awareness of domestic violence risks and willful disregard of such risks may shock the conscience. *See Okin*, 577 F.3d at 431–32. In *Okin*, police officers regularly failed to arrest a domestic violence perpetrator and implicitly encouraged his behavior. *Id* at 429–32. That court held a factfinder could find the danger the woman faced "was the product of deliberate indifference." *Id.* at 432. Here, like in *Okin*, there was a domestic violence situation between Ms. Jones and Baker. *Id.* at 427; R. at 2. Further, the City would have been at least aware of the risks Baker posed to Ms. Jones and A.J. However, unlike in *Okin*, where the officers did not act over a long period of time, here, the Officers took Baker into custody immediately and later seized his weapon. 577 F.3d at 432; R. at. 2. Therefore, the Officers appreciated the gravity of the situation by responding immediately after her complaint.

Second, in a non-custodial setting, there must be a showing of the official's deliberate indifference to or disregard of the risk facing the victim. *Waddell*, 329 F.3d at 1305–06. In *Waddell*, officials released a man previously convicted of battery and enlisted him as a confidential informant. *Id*. at 1302–03. While serving as a confidential informant, the man got drunk, lost control of his car, and collided with an oncoming vehicle, killing one of its occupants. *Id*. The Eleventh Circuit held a person does not have a due process right to be protected from the release of a convicted individual. *Id.* 1306–07. The court reasoned that the officers did not know about or disregard a great risk that the man would eventually cause a fatal collision. *Id*. at 1307. The court noted the officers were not on notice that the man would drive while intoxicated and cause an accident because the man's previous DUI conviction happened a decade prior. *Id*. at 1307.

Here, although the Officers did not warn Ms. Jones about Baker's release, the Officers did not show deliberate indifference. In *Waddell*, the man released was a convicted criminal, whereas here, Baker only had an arrest warrant. *Id.* at 1302; R. at 2. Therefore, Baker's release posed less of a risk to individuals than the release of someone who had been convicted of battery. Moreover, if there is no constitutional protection from the general release of convicted individuals, there can be no expectation of liability in a situation where the person released has not been convicted. Although the Officers may have been on notice about the risk Baker posed toward Ms. Jones and A.J. because of his threats and an unrelated arrest warrant, releasing Baker and not informing Ms. Jones did not show deliberate indifference. Unlike in *Waddell*, when the officers were not on notice the man would drive while intoxicated because his DUIs happened a decade prior, here, the Officers were on notice about Baker's violent behavior because of his threats, the outstanding warrant, and information from Ms. Jones. 329 F.3d at 1307; R. at 2. Nevertheless, the Officers'

conduct was not deliberate indifference because they arrested Baker, took his gun, and intended to place him in jail.

Third, courts evaluate this level of culpability based on the time constraints surrounding the situation. *See Irish*, 979 F.3d at 75 (stating a "higher level of culpability" is required when an official "must act in a matter of second or minutes" compared to when "officials have the opportunity to make unhurried judgments"). Here, the Officers did not have the opportunity for unhurried judgments because they could not lock Baker up on the outstanding warrant and had to make a decision about where to place him for the evening. R. at 2. Given the circumstances, with the lower threshold of culpability, the Officers did not shock the conscience by releasing Baker.

Fourth, a court may consider whether law and police policy violations took place when considering whether an official's conduct rose to the level of conscience-shocking culpability. *Irish*, 979 F.3d at 74. In *Irish*, the First Circuit found that police's "utter disregard" for procedure rendered it possible for a jury to conclude they acted "deliberately indifferent" to the danger they created. *Id*. at 79. Unlike in *Irish* when police officers ignored procedure, here, the Officers followed jail overcrowding procedure by releasing Baker. *Id.* at 70; R. at 2. The Officers did not act indifferently by obeying procedure and the City did not have procedures stating officers must inform individuals when someone is released from police custody due to the jail overcrowding policy.

Fifth, a valid exercise of police discretion does not amount to "conscience-shocking disregard" of constitutional rights. *Villanueva*, 779 F.3d at 513. In *Villanueva*, a woman shared with a city police chief that her ex-husband assaulted her, but the police chief never filed a report. *Id*. at 510. Subsequently, the police chief and woman had a brief romantic affair. *Id*. After the affair ended, the woman saw strange cars outside of her home and received threatening calls referencing

the police chief or conversations she had with him. *Id*. Although she reported this harassment, the police department did not take action. *Id*. The woman sued the police chief because he did not formally report her domestic abuse claim and she sued the department because it did not respond to her harassment complaints. *Id*. at 512. The Eighth Circuit held neither conduct was egregious to the point of shocking the conscience. *Id.* The court reasoned that choosing not to report an incident, investigate a matter, or arrest someone fell within police discretion. *Id.* at 513. Further, there could not be an expectation to make an arrest on the basis of every complaint.

Here, the Officers' decision not to tell Ms. Jones was a matter of police discretion. Like in *Villanueva*, in which the officers decided not to formally report the domestic abuse or investigate the woman's every complaint, the officers chose not inform Ms. Jones about Baker's release. *Id.* at 512; R. at 2. The Officers' decision did not disregard Ms. Jones's and A.J.'s safety because the Officers exercised police discretion to determine whether informing Ms. Jones was necessary.

Therefore, even if this Court should find the state-create danger doctrine provides viable constitutional claims, this Court should hold the City and Officers did not violate Ms. Jones's and A.J.'s due process rights.

II. The damage to Ms. Jones's property is not a compensable taking under the Takings Clause of the Fifth Amendment because detonating the bomb was a necessary and valid exercise of the City's police powers.

Under the Takings Clause of the Fifth Amendment, the government may not take private property for public use without just compensation. U.S. CONST. amend. V. A compensable taking occurs when a government regulation erases all the property's economic value, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992), or when the government seizes or occupies all or a portion of property for public use, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Courts have long recognized that compensation is not required under the Takings Clause when an individual's property is damaged or lost due to a valid exercise of the

government's police power to preserve and protect public health or safety. *See United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 154 (1952) (destruction of oil terminal facilities by United States Army during wartime). In these situations, compensation is not required. *See id.* at 156.

Here, the City is not required to compensate Ms. Jones for the damage to her property because the damage did not result from a government taking. The City enacted no regulation rendering Ms. Jones's property economically valueless, and the City did not occupy or seize any portion of her property for public use. Even if detonating the bomb was a physical seizure or occupation, the City's action was an objectively necessary and valid exercise of its police power. Therefore, this Court should adopt the Fifth Circuit's "objectively necessary" exception to the just compensation requirement, *see Baker v. City of McKinney*, 84 F.4th 378, 379 (5th Cir. 2023), *cert. denied* 145 S. Ct. 11 (2024), to affirm that Ms. Jones failed to assert a claim for a compensable taking under the Fifth Amendment.

A. Damage to Ms. Jones's property was not a taking under the Takings Clause of the Fifth Amendment.

The Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Property is taken for "public use" and requires just compensation when the state seizes property as an exercise of the state's power of eminent domain. *See Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 274 (2024) ("The Takings Clause's right to just compensation coexists with the States' police power to engage in land-use planning . . . . While States have substantial authority to regulate land use, . . . the right to compensation is triggered if they 'physically appropriat[e]' property or otherwise interfere with the owner's right to exclude others from it."). Property altered or seized by the government for public benefit requires just compensation. *Bachmann v. United States*, 134 Fed. Cl. 694, 696 (Fed. Cl. 2017).

Takings claims are necessarily "situation-specific factual inquiries." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 32 (2012). Regardless, this Court has drawn two bright lines for what constitutes a taking. First, a taking arises from a permanent physical government occupation of any portion of property. *Loretto*, 458 U.S. at 426 (the state's permanent installation of cable equipment on the owner's property was a physical occupation and required just compensation). "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). *See also Loretto*, 458 U.S. at 435 ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'"). Second, a taking arises from a government regulation permanently erasing all economically beneficial use of property. *Lucas*, 505 U.S. at 1019 (the state's regulation prohibiting construction of permanent habitable structures on the state's barrier islands erased all economic value of the property and required just compensation).

Here, the City has not taken Ms. Jones's property. It is undisputed that the City did not seize or alter her property pursuant to its powers of eminent domain. Rather, the property was damaged in the course of the police's efforts to neutralize the bomb threat. R. at 3. Therefore, within the meaning of the Fifth Amendment, the City did not take Ms. Jones's property for public use. *See Sheetz*, 601 U.S. at 274. Moreover, neither of the categorical takings apply. First, the City did not permanently occupy any portion of the property. *See Loretto*, 458 U.S. at 426. The police responded to a bomb threat by temporarily and necessarily entering the property but did not permanently install any devices or permanently occupy any portion of the property to neutralize the threat. R. at 3. By responding, the police did not acquire any interest in possessing, using, or disposing of the property. *See Loretto*, 458 U.S. at 435. Second, no duly enacted regulation erased

all the property's economic value. *See Lucas*, 505 U.S. at 1019. The police acted in response to a public safety emergency, not pursuant to any regulation. R. at 3. Absent a regulation, there can be no regulatory taking. Therefore, the Takings Clause is inapplicable, and no compensation is required, because the City did not exercise its power of eminent domain, did not physically and permanently occupy the property, and did not enact a regulation erasing the property's value.

B. Even if this Court held the damage to Ms. Jones's property was a taking, compensation is not required because the damage was an objectively necessary exercise of the City's police power, and the City did not exercise its eminent domain authority.

This Court has recognized that "in times of imminent peril . . . the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved." *Caltex (Philippines), Inc.*, 344 U.S. at 154. Here, the bomb Baker placed on Ms. Jones's property could not be secured and posed a threat to the lives and property of those nearby. R. at 3. As a result, and in accordance with precedent, the City's efforts to neutralize the threat do not require the City to compensate Ms. Jones.

1. The damage was objectively necessary to preserve public safety.

Compensation is not required when the government damages or destroys real and personal property when such damage or destruction is actually necessary to prevent "grave threats to the lives and property of others." *Lucas*, 505 U.S. at 1029 n.16. Applying this principle, the Fifth Circuit held that "as a matter of history and precedent, the Takings Clause does not require compensation for damaged or destroyed property when it was objectively necessary for officers to damage or destroy that property in an active emergency to prevent imminent harm to persons." *Baker*, 84 F.4th at 379.

In *Baker*, an armed fugitive evaded police and held a minor hostage inside of a homeowner's home while she was away. *Id.* at 380. The homeowner's daughter alerted the

homeowner, who then called the police. *Id.* The police pursued the fugitive to the home and set up a perimeter to secure the home and the community. *Id.* Because the fugitive claimed he was going to "shoot it out" with the police, the police used armored vehicles, toxic gas grenades, and explosive devices to reach the fugitive and neutralize the threat. *Id.* The homeowner and the police agreed that the police followed all proper protocol and that police action was necessary to resolve the situation. *Id.*

The homeowner sought compensation for the damage to her home, but the city denied her claim. *Id.* at 381. The homeowner asserted in a partial motion for summary judgment that the city was liable for the damage under the Takings Clause of the Fifth Amendment. *Id.* The district court granted her motion, and the Fifth Circuit reversed. *Id.* at 381, 379. The city argued that because the homeowner's property was damaged pursuant to an exercise of the city's police powers, there was no compensable taking, but the Fifth Circuit declined to apply the city's categorical police powers exception. *Id.* at 383. The court explained that history and precedent do not support the categorical exception because this Court has recognized that a taking may arise when a state's police powers go too far. *Id.* at 387 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415–16 (1922)). Rather, the court explained, precedent has long supported a "necessity privilege" where property damage or destruction was necessary to minimize or neutralize threats to the community. *Id.* at 387–88 (citing *Caltex*, 344 U.S. at 154–55 (avoid "imminent peril"); *Lucas*, 505 U.S. at 1029 n.16 (prevent "grave threats")). Applying that precedent, the court held that the city owed no compensation to the homeowner because "it was objectively necessary for officers to damage or destroy her property in an active emergency to prevent imminent harm to persons." *Id.* at 388.

Here, the damage to Ms. Jones's property falls squarely within the Fifth Circuit's "objectively necessary" approach. Like the armed standoff in *Baker*, the bomb that Baker placed

on Ms. Jones's back porch posed an imminent threat to persons and property in the surrounding area. *Id.* at 380; R. at 3. Where the police could not neutralize the threat in *Baker* without the armored vehicles, toxic gas, and explosive devices, the City could not neutralize the bomb threat without detonating the bomb. *Baker*, 84 F.4th at 380; R. at 3. Here, Baker planted the bomb on Ms. Jones's property and was not apprehended by the time the City responded to the threat. R. at 2, 3. The City could not have known whether Baker could detonate the bomb or if the bomb would have exploded on its own if the City attempted to move the bomb. R. at 3. Additionally, the City followed the proper protocol to neutralize the bomb threat by sending the robot to disrupt the bomb. R. at 3. The City was unable to disrupt the bomb, thus the bomb detonated. R. at 3.

Despite the damage, like the police in *Baker*, the City followed all proper protocol to neutralize the threat. *Baker*, 84 F.4th at 380; R. at 3. Therefore, this Court should adopt the Fifth Circuit's approach and hold that, because detonating the bomb where it was placed was objectively necessary to neutralize the threat to nearby people and property, the City is not required to compensate Ms. Jones for the damage to her property.

2. The damage was incidental to a valid exercise of the City's police power.

Several circuits have held that "the Takings Clause does not apply when property is retained or damaged as the result of the government's exercise of its authority pursuant to some power other than the power of eminent domain." *Johnson v. Manitowoc Cnty.*, 635 F.3d 331, 336 (7th Cir. 2011). *See also AmeriSource Corp. v. United States*, 525 F.3d 1149, 1154 (Fed. Cir. 2008) (explaining that plaintiffs fail to state a Takings claim when government exercises its authority pursuant to a power other than eminent domain); *Slaybaugh v. Rutherford Cnty.*, 114 F.4th 593, 603 (6th Cir. 2024) (expressing skepticism of a categorical police powers exception but nevertheless holding that compensation was not required for damage resulting from police actions during a lawful arrest); *Lech v. Jackson*, 791 Fed. App'x 711, 717 (10th Cir. 2019) (explaining that

exercising the police power rather than eminent domain does not give rise to a Takings claim). "Eminent domain is the power of the government to take property for public use without the consent of the owner." *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 487 (2021) (explaining that eminent domain authority is used for infrastructure projects). Courts have recognized a difference between the government's eminent domain authority and its police power to protect the health and safety of the community. *See Johnson*, 635 F.3d at 336. Absent an exercise of eminent domain, the government is not required to compensate property owners. *See id.*; *AmeriSource Corp.*, 525 F.3d at 1154; *Slaybaugh*, 114 F.4th at 603; *Lech*, 791 Fed. App'x at 717.

Here, the City did not exercise its eminent domain authority relative to Ms. Jones's property. The City did not seize her property to replace it with a park, expand a road, build a public utility, or any number of other infrastructural uses for the public's benefit. Rather, the City responded to and neutralized an active threat to the community. R. at 3. Once property was damaged, the City did not seize the land for its use. At all times, the property remained in Ms. Jones's possession and control. Therefore, because the City did not exercise its eminent domain authority, the City owes no compensation to Ms. Jones.

CONCLUSION

This Court should affirm the Thirteenth Circuit's decision to uphold the district court's grant of summary judgment for the City.

Respectfully submitted,

/s/ Team 4
Team 4
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